

6 Official Opinions of the Compliance Board 9 (2008)

NOTICE REQUIREMENTS – METHOD – TIMING – POSTED NOTICE OF CLOSED SESSION, HELD TO COMPLY WITH ACT, CLOSED SESSION PROCEDURES – VOTE TO CLOSE WAS HELD IN OPEN SESSION, AS REQUIRED BY ACT, DESPITE LACK OF AUDIENCE – MINUTES – CLOSED SESSION STATEMENT – INADEQUATE DESCRIPTION HELD TO BE A VIOLATION

January 8, 2008

Thomas J. Mumford, III
Linda Kent

The Open Meetings Compliance Board has considered your respective complaints that the Hebron Town Commission violated the Open Meetings Act in connection with a closed meeting held shortly after 6:00 p.m. on August 1, 2007. For the reasons explained below, we conclude that the Commission satisfied the notice requirements of the Act in announcing the meeting. The Commission also appears to have followed the Act's procedures for closing a session, including the requirement that the vote to close be held in open session (despite the fact that no member of the public was present to observe the vote). However, the minutes issued following the August 1 meeting contain an inadequate disclosure about the closed session.

I

Complaints and Responses; Supplemental Record

The initial complaint, filed by Mr. Mumford, indicated that the complainant arrived at the Hebron Town Hall at around 6:30 p.m. on August 1, 2007, to attend a public meeting of the Hebron Town Commission, at which time he learned that the Commissioners were then in a closed meeting. According to the complaint, each member of the Town Commission and the Town's attorney, Steven Cox, were present during the closed session. The complaint alleged that the session was conducted in violation of the Open Meetings Act in that there had been no announcement of the closing at a public meeting before the closed session.

In a timely response on behalf of the Town Commission, Anthony Gorski, Esquire, characterized the allegations in the complaint as without merit. According to the response, on July 30 a notice was posted at the Town office, as well as other locations in the Town where meeting notices are normally posted, announcing that the Commission would hold a closed meeting on Wednesday August 1, 2007 at 6:00 p.m. at the Hebron Town Hall. A copy of the notice was included with the

Commission's response. August 1, the first Wednesday of the month, was also the evening when the Commissioners would hold one of two regular monthly meetings.

The response indicated that at the appointed time, the Town Hall was open. However, the Commissioners and their counsel were the only ones present in the meeting room. The first order of business was to vote to hold the closed meeting. The response included a copy of a form, which reflected the date and time of the closed session, the vote in support of closure, and the statutory basis for closure, §10-508(a)(7),¹ and the notation that the meeting was closed "for advice of counsel regarding pending litigation." The form was signed by David Hooper, President of the Commission. The minutes of the public session that evening reflected the closed session.

Shortly after our receipt of the Town Commission's response, Ms. Kent filed a complaint concerning the same session.² Ms. Kent also arrived during the closed session, at which time she objected to staff that no public session was held at which the closed session was authorized. Notwithstanding her objection, no one at the time suggested that a public session had indeed occurred prior to the closed session. Moreover, in reviewing minutes and agendas, she found no evidence to support the suggestion that a public session was conducted in advance of the closed session. According to the complaint, "it appears only now is it being proffered by Mr. Gorski that there was a public meeting held just prior to the closed meeting." Furthermore, the complainant indicated that she subsequently spoke with the Town Clerk, who acknowledged that the minutes of August 1 reflected a 7:00 p.m. meeting time, not 6:00 p.m.

Ms. Kent followed up with a supplemental letter containing several attachments. Among these was a Public Information Act request to the Town for certain documents, including the minutes for the "purported open meeting" in advance of the closed session on August 1, copies of communications with the Commissioners regarding the closed session, and directions to the Town Clerk regarding the posting of notice. Ms. Kent provided the Town's response, indicating that no records responsive to the request existed.³ Ms. Kent's supplemental letter

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

² In submitting the second complaint to the Town for response, we indicated that we would address both complaints in a single opinion, because they dealt with the same meeting.

³ Ms. Kent also requested a copy of the agenda for August 1, which was provided; however, only the first page of the agenda was included with her letter to the Compliance Board.

also indicated that the document reflecting the closing of the meeting did not accurately record Mr. Hooper's vote.

In a supplemental response on behalf of the Town Commission, Mr. Gorski reiterated that notice of the 6:00 p.m. meeting was given, and, before closing the session, the Commission had voted to do so. The response emphasized that no one was barred from entering the meeting room before the session was closed. Furthermore, the response noted that neither complainant was present at the time; by their own acknowledgments, they entered Town Hall after the closed session had begun. However, in retrospect, the Town Commission realized an error had been made in the publicly available minutes for August 1. While the minutes show that the closed session occurred, they should have reflected that the Commission convened at 6:00 p.m., at which time the session was closed. The Commission described this error as harmless, in that the session was properly advertised and the minutes do in fact reflect the closed session. The response further noted that the Commission will review its process to ensure that this kind of error will not recur.

After our receipt of the Town Commission's second response, Ms. Kent submitted the meeting notice published in *The Daily Times* on August 1 announcing the Commission's meeting that evening at 7:00 p.m. Ms. Kent also submitted an additional e-mail suggesting that the newspaper announcement "trumped" various notices posted around town in that the former reflects "the customary method of such notifications by municipalities." Finally, Ms. Kent submitted a meeting notice for a Hebron Commission meeting scheduled for December 5, printed in *The Daily Times* on December 2, as "evidence that the newspaper notice is indeed the town's normal manner of advertising ... meetings."⁴

II

Analysis

A. Notice

Before a public body such as the Town Commission conducts a meeting that is governed by the Act, notice of the meeting must be provided, even if the meeting is to be closed. §10-506. Rather than prescribe a specific time period, the Act requires that the public body provide "reasonable advance" notice, granting the

⁴ The Open Meetings Act envisions a complaint in one submission and a single response to it, not an open-ended series of thrusts and parries. Nevertheless, when we receive supplemental information from a complainant, generally we offer the public body an opportunity to supplement its response. However, we did not invite the Town Commission to respond to Ms. Kent's additional correspondence, because we already had a sufficient record to issue an opinion.

public body flexibility in the scheduling of meetings. *Id.*; see 4 *OMCB Opinions* 51, 55 (2003).

In this case, a separate notice about the closed session was posted on July 30, two days before the meeting.⁵ It is not clear from the record at what point the need for the closed session was determined. Absent evidence of a deliberate delay in the notice, we cannot find a violation in the timing.

Nor is there a violation in the method of notice. Contrary to Ms. Kent's suggestion, no single method of notice, even one ordinarily used, has greater legal significance than another method. Because the Commission routinely posts notices of its meetings at the Town Hall and followed this practice in advance of the August 1 closed session, it did not violate the notice requirements of the Act.⁶

The Kent complaint also noted that a review of agendas failed to reveal the planned closed session held on August 1. While the Act requires that the notice is to reflect, "if appropriate, ... that part or all of a meeting may be ... closed ...," §10-506(b)(3), there is no requirement that a public body make an agenda available in advance of a meeting. 3 *OMCB Opinions* 264, 271-72 (2003). We note that the Commission's agenda for August 1 included a reference at the end to the closed session. It is not clear from the record when this was added. Nonetheless, because the Act does not require an agenda, no violation in connection with the notation could have occurred.

B. Process By Which Session Was Closed

Before closing a session under the Act, a public body must vote to do so, and the presiding officer is required to complete a written statement of the reason for closure, including the statutory authority, and the topics to be discussed. §10-508(d).

⁵ The Commission seemed to regard both sessions on August 1 as part of a single meeting. If that is so, the better practice would have been for the Commission to amend the prior notice of the open meeting, rather than issue a separate notice about the closed session. When a public body gives notice of a meeting and some material aspect then changes (for example, the time of the meeting or a probable closing of part of the meeting), the public body should issue a corrected notice, advising the public of the change. *See, e.g.*, 3 *OMCB Opinions* 297, 299 (2003). Nonetheless, the Commission's decision to issue a separate notice of the August 1 closed session resulted in substantial compliance with the Act.

⁶ Depending on when the 6:00 p.m. session was scheduled and the deadline for submitting material for publication, newspaper notice might have been infeasible.

We have no reason to question the Commission's assertion that this process was done.⁷

The public is entitled to witness the process by which a session is closed. §10-505. Both complainants objected that there was no public session in advance of the August 1 closed session. Apparently, the only ones present in the meeting room were the Commissioners themselves and their counsel. Nevertheless, based on the assertions in the Commission's response, we agree that this portion of the meeting was open, because anybody who wanted to observe could have done so. That neither the complainants nor anyone else arrived in time to observe the vote did not transform this session into a closed one. The fallen tree did make a sound, albeit unheard by the complainants.

C. *Minutes*

The Commission's minutes for August 1 declare that the meeting "was officially called to order at 7 p.m." In context, it is obvious that this refers to the regularly scheduled open meeting. Later in the minutes, reference is made to the 6:00 p.m. closed meeting. These time references are sufficient for any reasonable reader of the minutes to understand the sequence of events. It is harmless error, if indeed it be error at all, for the Commission to have omitted a specific reference to convening in open session at 6:00 p.m. to carry out the procedures for closing.

The Commission's minutes are defective, however, in their account of the closed session. Under §10-509(c)(2), a public body must disclose certain information about a closed session: its time, place, and purpose; "a record of the vote of each member as to closing the session"; the authority under which the session was closed; and "a listing of the topics of discussion, persons present, and each action taken during the session." The following is the Commission's disclosure about the August 1 closed session: "A closed meeting was held at 6:00 p.m. before the regular Commissioner Meeting for advice of council [*sic*] regarding pending litigation. No Town business was conducted. No other matters discussed." This disclosure,

⁷ The written statement submitted with the Commission's initial response was dated August 1, 2007, 6:00 p.m. However, in the statement's reason for closing, the presiding officer noted, in part, that "no other business conducted, no other matters discussed." The use of the past tense might suggest that the entire form was completed after the fact, which would violate §10-508(d)(2), or perhaps the quoted phrase was added after the closed session to an already-prepared form. We have insufficient information to resolve this point.

Ms. Kent's letter also indicated that the form did not accurately reflect Commissioner Hooper's vote in favor of closure. While the response did not address this point, we observe that it was Commissioner Hooper who signed the form. If Ms. Kent's point is that his name was not listed at the top of the form, we simply note that it is not unusual for a presiding officer to refrain from voting except when necessary to break a tie.

because it omits the vote to close and the identity of those present and describes the topic too cryptically, falls short of the Act's requirement. *See, e.g., 3 OMCB Opinions* 8, 11-12 (2000).

III

Conclusion

We find no violation in connection with notice of the closed session held on August 1, 2007, or with the process preceding the closing. However, the minutes issued following the August 1 meeting contain an inadequate disclosure about the closed session.

OPEN MEETINGS COMPLIANCE BOARD

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